INDEX

CITATIONS

511289—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 661

ORMAN W. EWING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 110–123),[1] affirming the judgment of conviction, is not yet reported. The memorandum opinion of the district court denying petitioner's motion for a new trial is set forth at R. 29–67.

[1] Pursuant to stipulation (R. 135), the printed record consists of the appendices of the briefs filed in the court of appeals and the proceedings in that court. References to the original record of the entire proceedings, which has also been filed, will be designated "Tr."

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1942 (R. 124). The petition for rehearing, filed December 8, 1942 (R. 124), was denied by the court of appeals on December 11, 1942 (R. 133). The petition for a writ of certiorari was filed on January 18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether it was error to impeach a defense witness on cross-examination and through rebuttal testimony by showing that prior to the trial the witness had stated a belief in defendant's guilt, where the statement was coupled with a statement of an obligation nevertheless to be on defendant's side, and where the belief in guilt was inconsistent with the facts testified to by the witness.

2. Whether petitioner was prejudiced by the prosecutor's questions propounded on the examination of members of the jury panel and on cross-examination of a defense witness.

STATEMENT

On February 21, 1942, petitioner was convicted (R. 20, 21) in the United States District Court for the District of Columbia under a one-count indict-

ment (R. 1–2) which charged that he committed rape against one Betty Ruth Crandall in the District of Columbia on October 26, 1941. On June 30, 1942, he was sentenced to the penitentiary for a period of eight to twenty-four years (R. 22).

The pertinent testimony may be summarized as follows:

On October 12, 1941, the complaining witness, Betty Ruth Crandall, came to the District of Columbia from her home in Provo, Utah, to take a civil-service position with one of the Government agencies (Tr. 750). Upon her arrival, she went to the Whitestone Apartments to reside temporarily with Hester C. Chamberlin, a friend of long standing of her mother's (Tr. 1170, 1194–1195), who owned and managed the Whitestone jointly with petitioner (Tr. 752, 1057, 1262). While at the Whitestone, the witness occupied the bedroom of Miss Chamberlin's two-room apartment in the basement of the premises (Tr. 755), and Miss Chamberlin during this period occupied the front room of the apartment, known as the "pine room" (Tr. 1138–1139).

Around 12:30 a. m. on the night of October 25, 1941, Miss Crandall returned to the Whitestone with one Robert Payne, a tenant of the apartment, with whom she had three engagements during her stay there (Tr. 765, 768). After talking to Mr. Payne for a short time, she made her adieu and went to Miss Chamberlin's apartment, arriving there about 1:00 or 1:15 a. m. (Tr. 768, 769). In

the "pine room" of the apartment, she found Miss Chamberlin and petitioner (Tr. 769–770), whom she had seen approximately ten times since being introduced to him by Miss Chamberlin shortly after her arrival in Washington (Tr. 764). Both Miss Chamberlin and petitioner were drinking (Tr. 769–770, 1135–1136, 1274–1276). Petitioner was fully clothed and appeared to be normal, but Miss Chamberlin was attired in a nightgown and "looked so dopey and talked so strange" (Tr. 769, 770). After talking to Miss Crandall for a few minutes and offering her a cigarette and a drink, both of which were refused, petitioner left, assisting Miss Chamberlin from the room (Tr. 771–772). Miss Crandall then retired to the adjoining bedroom, and, having prepared for bed, locked the bedroom door and retired to bed (R. 69). The lock, though broken in one place, could be made to hold (Tr. 760, 1174). Twenty or thirty minutes later, petitioner, having broken in the door, entered the bedroom attired only in his underwear and proceeded, despite Miss Crandall's protests and by use of force and threats of death, to have sexual intercourse with her (R. 69–70, 72).

After he had completed his act of intercourse, petitioner took a sheet into the "pine room" and there washed it. When he brought the sheet back into the bedroom, he handed Miss Crandall a syringe and instructed her in the use of it, and she then went to the bathroom adjoining the "pine

room" and attempted to use it. Petitioner afterwards took the syringe from her and held it over the open flame of the gas stove in the "pine room." She then returned to her bed in the adjoining room at petitioner's order, where she stayed for the remainder of the night in the belief that petitioner had remained in the "pine room," thereby preventing her free exit from the bedroom (R. 70–72).

The testimony of the prosecutrix was corroborated by certain circumstances testified to by other witnesses: She told friends of the attack upon her within twelve hours of the time it was alleged to have occurred (Tr. 866–867, 871–872). Complaint was made to the police within twenty-four hours (Tr. 964–966). The lock on the bedroom door, when examined after the complaint had been made, showed two breaks, one of which appeared to be fresh (R. 81). She was extremely shaky and hysterical for at least twenty-four hours after the alleged attack (Tr. 866–867, 876, 885–886, 965, 997). Physical and medical evidence, outlined in the opinion below (R. 112), was also corroborative (Tr. 887–889, 947–948). When arrested, petitioner made an equivocal response to the prosecutrix's accusation (Tr. 1000) and admitted that he was in the apartment on the night of the alleged crime (R. 41–42).

Miss Chamberlin, on behalf of the petitioner, testified that about 12:45 a. m. of the night in question she and petitioner were in the "pine

room" working on accounts; she admitted that both of them were drinking (Tr. 1134–1136). Miss Crandall came in at approximately 1:30 a. m. and had a drink with them (Tr. 1136–1137, 1211). Petitioner left the room alone about ten minutes later (Tr. 1137). Miss Chamberlin then retired to bed in the "pine room" about 2:00 a. m. at which time Miss Crandall was in the adjoining bedroom (Tr. 1137–1138). Miss Chamberlin further testified that she was a light sleeper (Tr. 1181), and that noises in Miss Crandall's bedroom could be heard very plainly in the "pine room" (R. 73). No one could without her knowing it, and on that night no one did: (1) go from the "pine room" to the bedroom; (2) converse in the bedroom; (3) wash a sheet in the bathroom of the "pine room"; (4) fix and use a douche in the bathroom; (5) use the gas range in the "pine room"; (6) use force of any kind against the door between the "pine room" and the bedroom (R. 38–39).[2]

[2] Later petitioner testified in his own behalf that he had worked in the "pine room" of Miss Chamberlin's apartment until after 1:00 a. m., and a short time later called his home to inform his wife that he would spend the night at the Whitestone. Miss Crandall entered the room about 1:30 a. m. and had a drink with petitioner and Miss Chamberlin. Petitioner admitted that he and Miss Chamberlin had been drinking but denied that either of them was intoxicated. He further testified that around 3:00 a. m. he retired to a vacant room in the basement across the hall from the pine room, and categorically denied having intercourse with Miss Crandall (Tr. 1260–1294).

On cross-examination, the witness was questioned concerning a trip to Provo, Utah, and an interview there with Miss Crandall's mother. After Miss Chamberlin admitted the interview, she was interrogated as follows (R. 74):

> Q. Now, in that conversation did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say "Yes"?—A. No; she didn't.
>
> Q. In that conversation didn't you say to her that Ewing was facing the electric chair and that you would have to be on his side?—A. No. I told her he was facing the electric chair. I told her I would have to tell my story as I knew it irrespective of who it affected.

After the petitioner had rested his case in chief, Mrs. Afton B. Crandall, mother of the prosecutrix, testified without objection [3] as follows (R. 75):

---

[3] Petitioner was represented at the trial by H. L. McCormick, C. H. Smith, and Roy S. Parsons, counsel of his own choosing; and petitioner's son, Lowell Ewing, a member of the local bar since 1937, while not counsel of record, advised with the defendant and with counsel in the preparation for trial (R. 47–48). His present counsel did not enter the case until after the motion for new trial had been filed (R. 21). After making his appearance in the case, present counsel filed an amendment (R. 27) to the motion for new trial in which he set forth, in the support of the motion, that petitioner had been denied effective assistance of counsel. Later, petitioner filed with the trial court an affidavit (Tr. 130–143) in which he charged that trial counsel McCormick had fraudulently and deliberately attempted to lose the case. Neither of these two contentions is now urged, but among

Q. On that occasion [i. e., Miss Chamberlin's conversation with the witness at Provo, Utah] did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter" and did she say, "I do believe it"?—A. Yes; she did.

Q. Did she further say on that occasion "He is facing the electric chair and I have got to be on his side?"—A. Yes.

ARGUMENT

I

Petitioner contends that the cross-examination of Miss Chamberlin concerned a collateral matter, and that, therefore, the Government was bound by her answer (Pet. 11, 15, 20). He contends, further, that the subject matter of this cross-examination

---

other matters complained of in the affidavit was the failure of trial counsel to ask for a mistrial upon Mrs. Crandall's testimony in contradiction of Miss Chamberlin (Tr. 138). McCormick and two other trial counsel filed affidavits contradicting petitioner's charge of fraud. In the affidavit which he filed, Mr. Parsons explained why a mistrial was not asked for in the following language (R. 82):

"It was anticipated prior to the trial that Afton Crandall would appear, and that if she did appear she would possibly be called as a witness to relate a conversation with Hester Chamberlin for the purpose of showing interest, bias, or personal feeling on the part of Hester Chamberlin, a defense witness. The question was fully discussed among all counsel and with Lowell Ewing, and the judgment of counsel was that such testimony was not inadmissible for that purpose * * *."

and of the testimony of Mrs. Crandall in contradiction of Miss Chamberlin was inadmissible because it concerned the opinion of a witness as to the guilt or innocence of petitioner (Pet. 10, 15–20).

The conversation between Miss Chamberlin and Mrs. Crandall which the Government first sought to establish on the cross-examination of Miss Chamberlin, and then by the testimony of Mrs. Crandall, plainly showed that Miss Chamberlin was biased in favor of the petitioner. Testimony that she said to Mrs. Crandall, a friend of long standing, that, though she believed petitioner was guilty of an offense against Mrs. Crandall's daughter, "I have got to be on" the side of her daughter's despoiler because he faced the electric chair, was obviously evidence of bias. When to this statement there is added the fact that Miss Chamberlin testified, as of her own direct knowledge, to a state of facts which, if true, proved the innocence of the petitioner, her bias would seem to have been plainly shown if the jury believed the testimony of Mrs. Crandall, as it was entitled to do.

Since the cross-examination of Miss Chamberlin was directed to the disclosure of her bias in favor of the petitioner, the very authorities relied upon by petitioner (Pet. 15) demonstrate that it did not concern a "collateral" matter in the sense that the Government was concluded by the answer of the witness. Thus, in *Attorney-General* v.

Hitchcock, 1 Exch. 91 (1847), both Pollock, C. B., and Alderson, B., were clearly of the opinion (and Rolfe, B., said nothing to the contrary) that the bias, hostility and want of an impartial mind on the part of a witness were not collateral matters concerning which a cross-examiner is bound by the answer of a witness. And in 1 Greenleaf on *Evidence* (16th ed., 1899), § 461f, the same view is taken.[4] Moreover, the authorities cited by petitioner, insofar as they bear on the point for which we have borrowed them, are supported by the federal cases and uniformly by the leading treatises on evidence. *United States* v. *Schindler,* 10 Fed. 547, 549 (C. C. S. D. N. Y.); *Hoagland* v. *Canfield,* 160 Fed. 146, 170–171 (C. C. S. D. N. Y.); *Woods* v. *United States,* 279 Fed. 706, 711 (C. C. A. 4); *Farkas* v. *United States,* 2 F. (2d) 644, 647 (C. C. A. 6); *Sprinkle* v. *Davis,* 111 F. (2d) 925 (C. C. A. 4); *United States* v. *Glasser,* 116 F. (d) 690, 702 (C. C. A. 7), reversed on other grounds,

[4] "Another mode of discrediting a witness is by showing (either through cross-examination or by other witnesses) that the witness has at another time stated the opposite of what he now states * * *. A limitation here obtains * * *, viz., that the proof of inconsistent (or self-contradictory) statements cannot be made through other witnesses upon matters 'collateral' to the issue. * * * As pointed out * * * the orthodox doctrine regards facts showing bias or corruption as not collateral; and this doctrine is generally accepted in this country * * *" (Op. cit. *supra*, p. 590 *et seq.*).

315 U. S. 60; see *Wills* v. *Russell,* 100 U. S. 621, 625; *United States* v. *Dickinson,* 25 Fed. Cas. (No. 14958) 850, 851 (C. C. D. Ohio); III Wigmore, *Evidence* (3d ed., 1940), §§ 948, 950, 1003–1005, 1020–1022; III Wharton, *Criminal Evidence* (11th ed., 1935), §§ 1346, 1417; Underhill, *Criminal Evidence* (4th ed., 1935), §§ 401, 437; III Jones, *Evidence in Civil Cases* (4th ed., 1938), § 828.

Apart from the matter of bias, the cross-examination of Miss Chamberlin did not, for a further reason, concern a collateral matter as to which the Government was bound by her answer. It is settled that a prior statement of a witness, inconsistent with his testimony to facts in issue, is not a collateral matter on which his answer to a question by the cross-examiner is conclusive, and that the cross-examiner may, to impeach the witness, prove by contradictory testimony that the prior inconsistent statement was made. *Chicago & N. W. Ry. Co.* v. *De Clow,* 124 Fed. 142, 147 (C .C. A. 8). The cross-examination of Miss Chamberlin would seem to fall within this rule. Her prior statement expressing the belief that petitioner was guilty, though expressed in the form of opinion, was contrary in a factual sense to facts at issue to which she herself testified on direct examination. Upon her testimonial assertion of knowledge of the facts in issue which was irreconcilable with her prior belief, her statement of that belief was given a factual content from the standpoint of admissibility for testi-

monial impeachment through contradition. *Pierce* v. *Sanden,* 29 F. (2d) 87, 90–91 (C. C. A. 8);[5] *Holder* v. *State,* 119 Tenn. 178, 217–227 (1907); *Bates* v. *State,* 4 Ga. App. 486, 489–491 (1908); *State* v. *Matheson,* 130 Iowa 440, 447–448 (1906); *State* v. *Exum,* 138 N. C. 599, 609–611 (1905); *Commonwealth* v. *Wood,* 111 Mass. 408, 410 (1873); *State* v. *Kingsbury,* 58 Me. 238, 240–243 (1870); *Lowe* v. *State,* 118 Wis. 641 (1903); *Mayer* v. *People,* 80 N. Y. 364 (1880); III Wigmore, *Evidence* (3d ed., 1940), § 1041.

Petitioner insists that the testimony was inadmissible because it was couched in the form of an opinion of a witness as to the guilt of the accused. The cases just cited support the admissibility of the testimony. It is nevertheless true that there is a dearth of reported authority on the point in the federal courts, and there are some general expressions of inadmissibility in certain state cases. See the authorities cited in III Wigmore, *supra,* Section 1041. Our position, that such testimony should be admitted in the circumstances disclosed in the present case, is founded on the reasoning in the authorities already cited. The statement of Miss Chamberlin here in question, though couched in part in the form of belief in petitioner's guilt, showed when taken as a whole that she was biased

[5] "The statement of the witness, although a general conclusion ['You are not to blame'], tended to contradict his testimony as to particular facts which indicated a contrary conclusion" (p. 91). Exclusion of the evidence was held reversible error.

in petitioner's favor, and made her testimony untrustworthy; so at least the jury was entitled to conclude. Moreover, the belief in petitioner's guilt was inconsistent with her testimony in chief, which tended directly to negative the possibility of his guilt. The cases cited by petitioner (Pet. 15–20) do not reject the admissibility of such evidence in these circumstances. In none of those cases was the previously expressed opinion indicative of bias[6] or of knowledge of facts in issue later testimonially asserted which are irreconcilable with the prior opinion.[7]

Finally, petitioner states (Pet. 10) that the decision of the court below is fraught "with the gravest danger." By this is apparently meant that the decision of the majority permits the use of opinion evidence as a substantive evidence of a defendant's guilt in a criminal case. The majority opinion, however, is at pains to point out that the ruling in respect of the cross-examination of Miss Chamberlin and the contradictory testimony of Mrs. Crandall is "limited to the facts of this case, and similar situations." The opinion had already explained the distinctive features of the issue as presented in the instant case (R. 116–122).

---

[6] The only case cited by petitioner which gives any consideration to a prior opinion indicating bias states in a dictum that such an opinion can be used to contradict a witness. *Drake* v. *State*, 29 Tex. Cr. 265, 277 (1890).

[7] *Yeager* v. *United States*, 16 App. D. C. 356, 359 (1900), which the petitioner states the court below in effect overruled in the instant case (Pet. 15–16), is clearly distinguishable on the grounds stated in the text.

Although not stressed by petitioner, a word should be added concerning *Shepard* v. *United States,* 290 U. S. 96, 104, cited in the concurring opinion to show that Mrs. Crandall's testimony should have been excluded, if objected to, on the ground that it was impossible for the jury to avoid relying on it as substantive evidence. In the *Shepard* case, the defendant was charged with the murder of his wife, and the Government introduced, as substantive evidence of Shepard's guilt, testimony that his wife had said, "Dr. Shepard has poisoned me." On appeal, and in this Court, the Government sought to justify the admission of this evidence on the ground that it went to disprove the testimony of defense witnesses that Mrs. Shepard had stated that she had no wish to live and that some day she expected to take her life. This Court ruled, however, that even if the evidence had been introduced at the trial, with a proper limiting instruction, solely to contradict defense witnesses, it would still have been inadmissible; its tenuous logical relevance to the Government's case in this aspect was outweighed by the damage it would do the defendant's case, coming as the accusation of a wife from the grave. In the present case, however, the evidence in question would naturally be taken as impeaching the credibility of Miss Chamberlin, and if an instruction had been thought desirable it could, on request, have been readily framed and understood. In view of the

relevance of the testimony and the great importance of the issue of Miss Chamberlin's credibility, the "risk of confusion" did not "upset the balance of advantage" (290 U. S. at 104).[8]

II

A. Petitioner next contends (Pet. 6, 20–23) that he was prejudiced by the cross-examination of his witness Simmons. The substance of the question was whether petitioner on the night of the crime suggested to the witness that they "get some whiskey and go to the Whitestone and get some of the girls and have a party." Simmons twice answered the question in the negative, and the matter was not pursued further (R. 4). The question asked Simmons was, we think, a proper question to disclose his personal relations with petitioner for the purpose of permitting the jury to assess his credibility. *Alford* v. *United States,* 282 U. S. 687, 691–692. However, even if the evidence sought to be elicited by the question was inadmissible, the mere asking of the question was not prejudicial. Particularly in the light of the other evidence in the case, it cannot fairly be assumed that the jury gave the question, twice

[8] The trial judge (Morris, J.) stated (R. 34): "There remains one further comment to be made in this connection. The testimony of Mrs. Crandall was clearly for impeachment purposes only. It was obviously so considered and so treated in argument of counsel."

denied and then dropped, the weight of substantive evidence of petitioner's immorality and intent to commit rape.

B. Petitioner also contends (Pet. 3, 6, 22–23) that he was prejudiced by the prosecutor's inquiry, made during the examination of the jury panel, whether any of the prospective jurors were acquainted with one Clarence D. Cunningham who had been "indicted for sending obscene literature through the mail" (Tr. 639–640). Neither the context of the statement nor the circumstances under which it was made show that it was designed to prejudice petitioner. And, in view of the fact that Cunningham was not called as a witness and that no connection between him and petitioner was shown, or that petitioner had intended to call him as a witness, we think that it is sheer speculation to suppose that any "atmosphere of hostility" (Pet. 23) was created by the statement.[9]

---

[9] The inherent weakness of petitioner's complaint as to the prosecutor's questions is demonstrated by the fact that no objection was taken at the trial and that neither point was thought to be of enough importance to be incorporated in the motion for new trial (R. 22–27) or in the assignment of errors (R. 27). It is true that in his affidavit charging fraud on the part of trial counsel (Tr. 135), petitioner complained of the fact that no objections were made. Trial counsel Smith in his counteraffidavit stated, however, that the witness Simmons appeared to be intoxicated and that the vigorous cross-examination by the Government was not surprising. He also stated that upon petitioner's demanding that he "do something to protect the witness," he started to get to his feet, but that at that point the Government "dropped the point, and the matter was closed" (Tr. 123).

CONCLUSION

While the question whether proof of a prior statement of opinion, inconsistent with testimony given at the trial, is, in the abstract, not unimportant, that question is not, we believe, presented in this case in circumstances calling for further review. The opinion here was a part of a statement showing bias and was also of factual content inconsistent with facts stated on the stand. We therefore respectfully submit the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
W. V. T. JUSTIS,
Attorneys.

FEBRUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943